

Save San Francisco Bay Association
California League of Conservation Voters
The Bay Institute of San Francisco
Environmental Defense
Pacific Coast Federation of Fishermen's Associations
Natural Resources Defense Council
Clean Water Action
California Sportfishing Protection Alliance
Friends of the River
Mono Lake Committee
Golden Gate Audubon Society
League of Women Voters of California
Sierra Club
California Trout

February 10, 2000

Hon. David Hayes
Deputy Secretary of the Interior
1849 C Street, N.W.
Washington, DC 20240

Hon. Mary Nichols
Resources Secretary
1416 9th Street
Sacramento, CA 95814

RE: CALFED Assurances

Dear Mr. Hayes and Ms. Nichols:

We write to you to in your capacity as co-chairs of the Policy Group to express our concern with the CALFED assurances package to date. Since its inception, CALFED has been premised on the notion that the Record of Decision (ROD) would contain not only a program of action covering the four CALFED problem areas, but a package of "assurances" that would provide confidence to all parties that the agreed upon "deal" would be carried out fully and fairly. Our organizations remain committed to the CALFED process. We have enormous regard for just how difficult this task has been and will continue to be, and for the hard work of the CALFED agencies, the Bay-Delta Program staff and the Policy Group members. We continue to believe that all parties stand to benefit significantly from a successful outcome.

However, with very few months remaining before issuance of the ROD, we are alarmed by the lack of progress on the key issue of assurances. Our concerns fall into two categories:

First, looking at the priorities of the environmental and fishing communities standing alone, CALFED has made little progress in developing assurances that the Ecosystem Restoration Program and the related Strategic Plan can be implemented so as to meet the restoration goals and objectives.

Second, looking at the Program as a whole, CALFED has made considerable progress in developing assurances for the water development community in

various forms of regulatory relief and stronger commitments to the depletion of more water out of the environment for consumptive use. Thus, we see not only a failure of the Program to develop reasonable assurances that its ecological goals can be met, but an imbalance in the way assurances are being addressed in CALFED generally.

This second concern is particularly acute because of numerous proposals to weaken existing environmental assurance mechanisms such as Section 404 protections, ESA requirements and water quality standards that the stakeholders, including water users, agreed to five years ago. This is in addition to the continuing campaign against implementation of Section 3406(b)(2) of the Central Valley Project Improvement Act (CVPIA).

There has been recent discussion that CALFED's intended purpose was to bring back the water user community to a pre-Accord, or pre-CVPIA, point in terms of water supply, or alternatively, that the Bay-Delta Accord was intended to establish an absolute cap on the amount of water that could be "reallocated" to environmental purposes. We must register our firm rejection of these misrepresentations. The facts regarding the establishment of CALFED and its relationship to the Accord are clear:

First, CALFED was never intended to "make up" for water expressly allocated to fish, wildlife and habitat restoration by Congress in the CVPIA.

Second, the Bay-Delta Accord was a political bargain in which all parties gained. The water users gained in particular by avoiding imposition of ESA and water quality restrictions that they regarded as less flexible than the ones agreed to in the Accord.

Third, the environmental measures in the Accord were the minimum required to stem the ecological crisis facing the Bay-Delta Estuary (and there was real doubt among many parties about whether the limited Accord measures could do even that). All parties understood and agreed that a far greater restoration program would be required.

Fourth, CALFED was intended to serve, among other things, as this restoration program. There was never any question that CALFED was to build upon the baseline established by the CVPIA and the Accord, not to compensate water users for these measures.

We provide this background to frame our concerns regarding the status of the assurance package. As indicated above, CALFED to date has focused much effort on ensuring that opportunities for new consumptive water development projects will be "streamlined" and in providing various forms of regulatory relief or additional regulatory "flexibility." Few of these efforts are tied to specific progress in achieving CALFED's ecological objectives. Our recommendations regarding the minimum assurances for the environmental objectives of the Program that must be addressed in the ROD are set forth below.

1. — There must be a clear commitment to a specific dedicated funding source for the Ecosystem Restoration Program. As we have discussed with CALFED staff and

Policy Group, a dedicated source of at least baseline funding for the restoration program is essential. CALFED has framed its entire approach to restoration as a fundamental shift away from regulation and "involuntary reallocations" of water toward a monetary-based program. This may be quite prudent and more likely to achieve restoration than the regulatory approach. However, we cannot emphasize strongly enough that if the restoration program is premised on there being large amounts of ready financing, CALFED must then have a clear and coherent plan in the ROD for providing assured funding beyond merely assuming that it will materialize in the future. As you know, the only firm funding for the ERP at this point is the \$390 million in Proposition 204.

User fees are often discussed for this purpose but only in vague terms and are opposed by water users. Many of our organizations have proposed that CALFED work with stakeholders and legislators to explore options for establishing baseline dedicated public funding (federal and state) that would provide a level of certainty and reliability to the ecosystem program annually.

We appreciate fully the political difficulty of this proposal. Nevertheless, the alternative appears to be a return to the very regulatory approach, and imposed user fees, that CALFED is anxious to avoid. We expect that annual appropriations will continue to play a role in financing the ecosystem program. However, it is not acceptable to rest the fate of this program primarily on the annual budgeting, or bonding, processes. It is difficult to imagine an implementation plan farther from the goal of providing "assurance."

2. — There must be a clear commitment to assured sources of water for the environment. Physical habitat restoration actions alone will not achieve CALFED's ecological goals. Water for the environment will be necessary. To date, CALFED has fallen short in developing a plan to assure that (1) such water exists and (2) the environment can lay claim to it when necessary. This concern has grown with the increasing number of challenges to existing assurances intended to provide water to the environment.

Indeed, something as seemingly unequivocal as a specific, numeric Congressional allocation of water to the environment from a federal water project has been thrown into dispute for seven years. Moreover, under DOI's current implementation plan for the (b)(2) water much, or even all, of that water could be used for nothing more than meeting existing water quality or ESA requirements. Similarly, the Accord water quality standards have yet to be fully implemented. This has led our organizations to conclude that new and improved assurances to provide water for the environment must be developed as a condition for CALFED's success.

Considerable discussion has gone into an Environmental Water Account (EWA). We consider this to be a promising concept, but one that CALFED has not yet put to good effect. Indeed, rather than providing a means of assuring water for the environment, it is more often characterized as a mechanism for making up "losses" to the water user community. As discussed in prior correspondence, the EWA in its current form is closely tied to new depletions of water from the environment.

We recommend a fundamental revamping of the EWA concept that goes back to the original focus on assuring water for environmental purposes. As we have proposed on numerous occasions, CALFED should also explore tying this Account to the legislative establishment of a state instream water right putting environmental water on par with other water rights in the system as other western states have done.

3. — There must be an institutional structure with the political, legal and fiscal authority to implement the restoration program. CALFED has devoted considerable effort in the last year to "governance" and has made important progress. The issue, however, is not merely the establishment of an institution (or the revamping of an existing one), but the ability of that institution to achieve the Program's restoration goals. This will require at a minimum appropriate financial resources (see above), the political authority to interact effectively with other CALFED agencies and the legislature, and the legal authority to support its actions. As discussed in prior correspondence, the current "governance" proposal still falls short of providing assurances of this nature. Nevertheless, this aspect of the assurances package is the most advanced and we are very encouraged by progress to date.

4. — The Program must avoid solutions for one problem area that undermine solutions for other problem areas. A basic, and appropriate, tenet of the CALFED program has been to recognize that California's water problems are integrated and thus the solutions to them must be developed as a package. We appreciate the difficulty of this task but agree that it is the only formula for a lasting peace.

For this reason, the assurance package must provide that not only the ERP, but the water supply reliability program is based on sound scientific and economic evidence. We are deeply concerned that CALFED is poised to propose significant new depletions of water from the ecosystem as a major aspect of its water management program, notwithstanding that it has failed to justify these additional depletions either biologically or financially. We have written extensively on both of these points and will not elaborate further here other than to reiterate that decision making must be fact-driven, not only for the ERP but all CALFED program areas. Mere assertions that new depletions are compatible with, or even in aid of, restoration are not sufficient. CALFED must address the substantial body of evidence and experience demonstrating that even when new diversions have been intended to benefit fish and wildlife, these promises have rarely — if ever — come to fruition and, such new diversions generally have resulted in ecological harm.

5. — CALFED must establish meaningful program "linkages." The key element of the assurances package will be how CALFED links program benefits and attainment of performance standards to ensure equitable progress across problem areas. This highlights a central problem; assurance issues for the most part have been segregated. For example, discussions about Section 404 are unrelated to discussions about ESA assurances, and both of these regulatory relief proposals have been largely isolate from discussions about restoration funding.

Of particular concern is the manner in which near term "bundles" of actions have been developed. For example, water supply benefits in the south delta have been bundled with ecological improvements in the same area. However, this "linkage" seems to be

little more than the required NEPA/CEQA mitigation. It does not appear that the "restoration actions" proposed for linkage to the south delta facilities have as high a priority as other restoration actions elsewhere in the system.

As we have proposed for several years, the assurance package must link ascertainable progress in achieving the performance standards in the four CALFED problem areas. Thus, if the south delta facilities are a high priority for water supply management, these facilities should be "linked" to equally important ecological priorities; for example, the establishment of a reliable water acquisition program.

It is of critical importance that assurances be viewed in the context of the Program as a whole. Thus, as we have indicated previously, regulatory relief assurances for the water users cannot be developed without considering how these proposals affect the balance of assurances throughout the CALFED Program. Are there parallel assurances that the ecosystem restoration program will receive the funding, water and institutional support required for its success?

A related issue is how the CALFED Program will define "parity of progress" in the problem areas. Significant efforts are going into defining CALFED's ecological goals in large part to assure water users that all parties will know "when we are done," or to provide a level of certainty as to what level of restoration can be reasonably expected from CALFED. However, virtually no progress has been made in developing similar standards for the water reliability program. The goal has shifted incrementally from "improving reliability" to, according to some, fulfilling the water supply needs of a projected additional 20 million Californians. CALFED's water supply goal, in other words, is becoming all but infinite. CALFED cannot survive this imbalance. The water supply reliability program, like the restoration program, must be subject to a rule of reason. Specific and clear performance standards must be in place prior to the ROD so that all parties will know "when we are done," or at least can claim success for CALFED.

6. — Finally, CALFED must give effect to its commitment to the "beneficiary pays" principle. Although this concept has been a CALFED staple for many years, the question of how, or even whether, it will be implemented remains vague. To date, CALFED has failed to define the parameters of the beneficiary pays commitment. This must be remedied prior to the issuance of the ROD.

We look forward to discussing these issues with you and other Policy Group members later this month. Thank you for your consideration of our views.

Sincerely,

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Fran Spivey-Weber
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Arthur Feinstein
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